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Subject: Prep for AEM meeting session- Enforcement Issues for MM2A (reversal of OIAI)

Flag: Follow up

Just to get thoughts going- I have jotted down some of my initial enforcement issues associated with the Wehrum MM2A memo.

**Do Not Disclose FOIA Exempt- Deliberative and Exemption 7.A
Enforcement Issues Arising from the 2018 MM2A Wehrum memo**

1. Can applicability accepted in Consent Decrees be changed through the use of PTE limits rather than complying with the requirements?
 - a. No- Consent Decrees are court documents and cannot be substantially changed unless approved by the court. But does the agency support an area source voluntarily complying with major source requirements if its basis for the policy position is that there is no authority in the CAA.
 - b. Yes- If applicability is part of the deal, does allowing a source to avoid compliance by permitting affect other injunctive relief or consent decree terms? For example, if we know complying with an MACT requires a CEMS, such that we did not insist on consent decree terms requiring a CEMS, does avoiding applicability by permitting alter monitoring that we could have gotten independent of the MACT applicability?
2. In analyzing cases and potential defenses, what limits are acceptable to ensure a source is no longer able to emit at major source levels?
 - a. Compliance with the MACT at issue may not be sufficient because once an area source, the MACT is no longer an underlying requirement, so it cannot be relied on to MM2A. There must be other sources of authority to ensure the source was not emitting at major source amounts, such as SIP minor source construction permits.
 - b. Enforceable as a practical matter is different for ensuring area source status versus ensuring a source complies with an NSPS or NESHAP. Other NSPS and MACTs will often not provide adequate limitations that are enforceable as a practical matter to ensure area source status because they do not apply at all times or possibly because they are equipment standards or work practice standard that do not allow for adequate quantification of annual emissions.
 - c. The prohibition on blanket emissions applies to "HAPs" as a category as well as individual identified HAPs- e.g., "source cannot emit more than 10 tpy of any one HAP" versus "Source cannot emit more than 10 tpy of benzene, or 10 tpy" so identifying the individual HAP does not correct the problem.
3. Can EPA legally bring cases in situations where a source has not actually emitted in major thresholds if EPA justifies the Wehrum memo and the upcoming rule on a Chevron 1 analysis- *i.e.*, it is clear in the statute
4. What is the policy on injunctive relief- in other words, once a non-compliant major source is identified in enforcement, does the memo allow the source to un-ring the bell??
 - a. Should we use the actual versus potential emissions threshold in the NSR injunctive relief memo?
 - b. Can we legally bring cases in situations where a source has not actually emitted in major thresholds if EPA justifies the Wehrum memo and the upcoming rule on a Chevron 1 analysis- *i.e.*, it is clear in the statute.
5. How will we calculate economic relief in enforcement cases of major source- *i.e.*, do we consider permitting to an area source as the least cost of compliance?

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